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IN THE

Supreme Court of the United States.

October Term, 1893.

No. 956 1893.

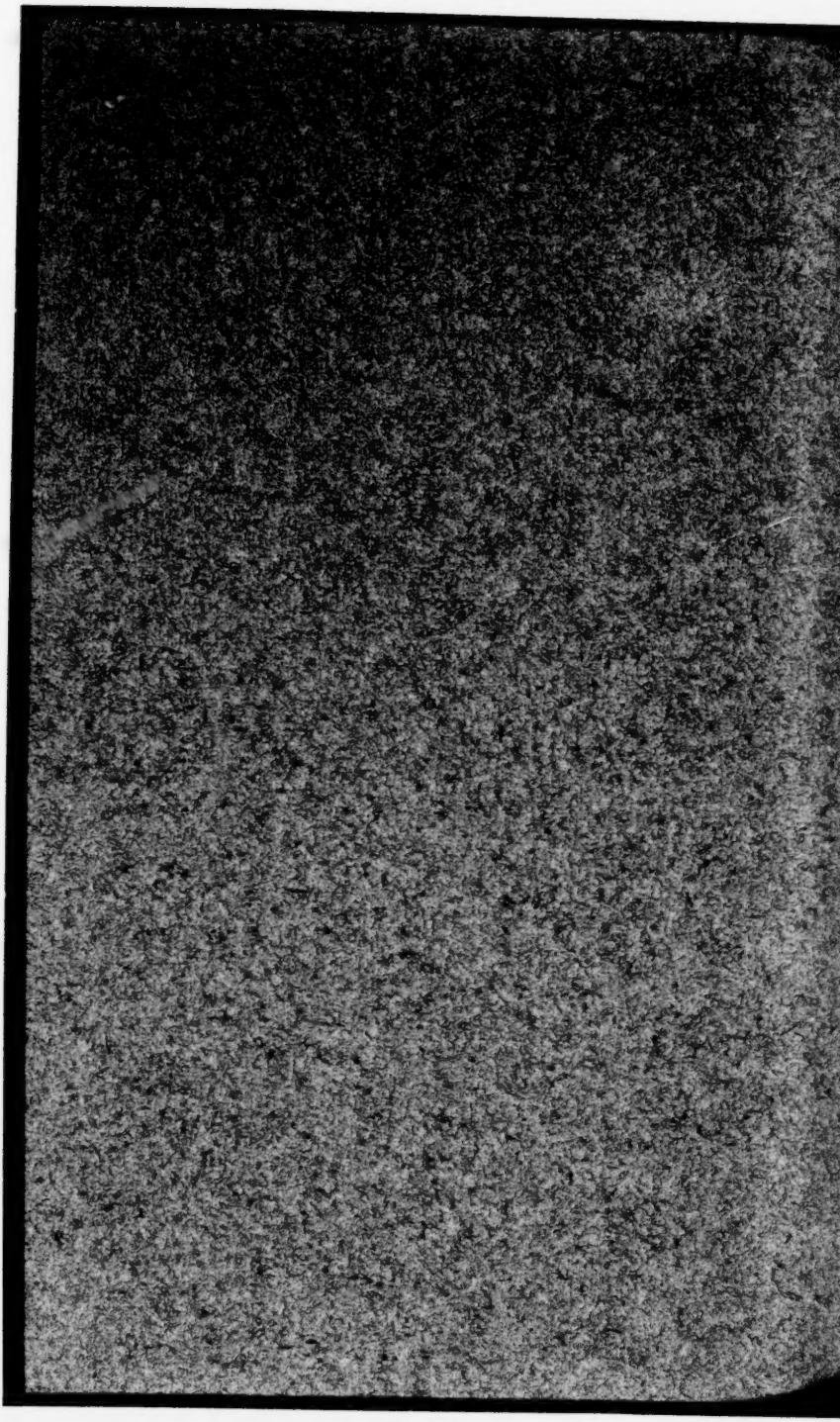
HANNAH O'CALLAGHAN and EDWARD CORCORAN,
Appellants,

vs.

TERENCE O'BRIEN, as Administrator of the Estate of JOHN SULLIVAN, Deceased, and MARIE CARRAU,
Respondents.

Brief of Respondents in Support of Motion to Dismiss Appeal.

W. P. HAYS,
JOHN H. MITCHELL,
Attorneys for Respondents.



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HANNAH O'CALLAGHAN and EDWARD CORCORAN, *Appellants.*
vs.
TERENCE O'BRIEN, as Administrator of the Estate of JOHN SULLIVAN, deceased, and MARIE CARRAU, *Respondents.*
No. 593.

Brief of Respondents in Support of Motion to Dismiss Appeal.

This is a motion to dismiss the appeal taken by Hannah O'Callaghan and Edward Corcoran, appellants, from the decree of the Circuit Court of Appeals for the Ninth Circuit, rendered September 14, 1903.

The question raised by this motion is simply this: That the decree of the Circuit Court of Appeals was final, for the reason that the sole ground of jurisdiction in the suit was the diversity of the citizenship of the parties.

Enough of the record in the case, and citations to the record now before the Court, will now be presented to enable the Court to determine the question. We con-

fidently insist that there is nothing in the record from the beginning to the end to show jurisdiction in the Federal Court, save and except the fact of the diversity of the citizenship of the parties.

Statement.

The following facts appear from the record in the case:

One John Sullivan died in the City of Seattle, State of Washington, on September 26th, 1900, seized of real and personal property of the estimated value of nearly five hundred thousand dollars. At the time of his death he was engaged to be married to the respondent, Marie Carrau, and the date of the marriage had been fixed for about October 1st, 1900. A few hours preceding his death he made a nuncupative will, devising all of his property to Marie Carrau, his fiancee.

The next morning, but a few hours after his death, Marie Carrau—being a Catholic—told Father Sweer, her spiritual adviser, of the oral will, requesting him to make inquiry of some lawyer, whether such a will was valid. Father Sweer made inquiry, and shortly afterwards informed her that an oral will was not good in the State of Washington.

It appears from the record that the deceased left no immediate relatives, no father, mother, or lineal descendents. Shortly after his death a special administator was appointed in the probate department of the Superior Court for King County, State of Washington, and on November 19th, 1900, the respondent, Terence O'Brien,

was appointed administrator and has been in possession of the estate ever since; and said estate has ever since been and is now in the course of administration in the probate department of said Court, and was at the date of the filing of the bill in this suit.

Relying on the advice given her by her spiritual adviser to the effect that the will was void, Marie Carrau did not ask for the appointment of an administrator. Some time after this she accidently learned from an attorney that an oral will was valid in Washington. She immediately, on getting this information, on March 8th, 1901, presented her petition to the Probate Court, praying that the nuncupative will be admitted to probate. Acting on this petition, said Probate Court admitted this will to probate by the usual, ordinary decree in a Probate Court, and Terence O'Brien was continued as administrator of said estate under said probated will.

The statutes of the State of Washington provide that any person interested may within one year contest a will so probated. Carrau *vs.* O'Callaghan *et al*, 125 Fed., 657. Quite a number of persons, claiming to be the only heirs of the deceased, gave notice of such claim and appeared in the State Court, in the case of the estate of John Sullivan, deceased. Among the different persons appearing in said court and petitioning in contest therein, alleging the invalidity of said will, were the petitioners, Hannah O'Callaghan and Edward Corcoran. Another claimant was Eugene T. Sullivan, who was at that date and for many years prior thereto a citizen and resident of the State of Washington, as was also

Marie Carrau and Terence O'Brien. All these contests of said will are still pending and undetermined in the State Court in the case in that court of the estate of John Sullivan, deceased. They were also pending at the date of the filing of the bill in this suit.

This suit was commenced June 20th, 1901, in the Circuit Court of the United States for the District of Washington, Northern Division, by a bill filed against Marie Carrau as legatee under said will, and Terence O'Brien as administrator of said estate, by the petitioners, Hannah O'Callaghan and Edward Corcoran, claiming to be British subjects and averring that the respondents were both citizens of the State of Washington. As will clearly appear from the record the principal and only purpose of the bill was to contest the nuncupative will so probated and revoke its probate. In addition to the allegation of diverse citizenship, the bill alleged that the will was secured and probated by fraud, and that the Probate Court did not issue proper citation, and hence it was alleged had no jurisdiction to probate the will. The administrator, O'Brien, by answer disclaimed any interest in the estate other than administrator appointed by the said State Probate Court. The respondent, Marie Carrau, appeared by her solicitors, made denial of any fraud, denied the jurisdiction of the Circuit Court of the United States, and contested the proceeding from beginning to end. The specific grounds of objection to the bill being, *first*, no jurisdiction of the subject matter, and, *second*, because it appeared upon the face of the bill that all the *necessary* parties were not before the court, and if

they had been the court would have been ousted of its jurisdiction, as Eugene T. Sullivan, who claimed to be the only heir of the deceased, was a citizen of the State of Washington, contesting the right to the estate with Marie Carrau.

The Circuit Court held that it had jurisdiction, and after a trial entered a decree against Marie Carrau, cancelling the will and revoking the decree of the State Probate Court probating the same. From this decree an appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit. That court reversed the Circuit Court, giving as reason, that the Circuit Court was without jurisdiction of the subject matter of the suit, and also because all the *necessary* parties were not before the court, and if made parties would have ousted the jurisdiction of the court. The Circuit Court of Appeals directed the Circuit Court to dismiss the bill.

Carrau *vs.* O'Callaghan, et als, 125 Fed., 657.

From this decision of the Court of Appeals the petitioners are here on appeal.

The Record.

Your Honors are cited to the following portions of the Record, now before the Court, which, it seems to us, show conclusively that the only ground of jurisdiction in the Circuit Court related to the parties, that of diverse citizenship; and further, that the Circut Court had no jurisdiction of the subject matter of the suit.

First. The bill of complaint set out in *haec verbae*

Record, Volume 1, pages 6–21.

Second. Motion of respondent, Marie Carrau, and affidavit of W. F. Hays, her solicitor.

Record, Volume 1, pages 24–25.

Third. Motion to dismiss the action submitted by the respondent, Marie Carrau.

Record, Volume 1, pages 29–32.

Fourth. Claim of heirship submitted by one Timothy Sullivan

Record, Volume 1, page 31.

Fifth. Plea in Abatement of respondent, Marie Carrau.

Record, Volume 1, pages 35–36.

These different pleas of the respondents were overruled by the Court.

Record, Volume 1, page 154.

Sixth. Answer of Marie Carrau.

Record, Volume 1, pages 64–79, inclusive.

Seventh. Replication.

Record, Volume 1, pages 84–85.

These several pleadings made up the issues involved, and a careful examination of these pleadings and of the issues joined by them discloses the fact beyond question that there is nothing in the record that would confer jurisdiction on the Federal Court save and except the diverse citizenship of the parties.

In considering the matter, however, attention is called to the opinion and decree of Circuit Judge Hanford—

Eighth. For opinion see

Record, Volume 1, pages 224–243, inclusive.

Ninth. And for the decree entered in that Court by Circuit Judge Hanford see

Record, Volume 1, pages 243–247, inclusive.

The attention of the Court is also directed to the opinion, judgment and decree of the Circuit Court of Appeals.

Carrau *vs.* O'Callaghan, 125 Fed., 657.

United States *vs.* Taylor, 147 U. S., 695.

Loeb *vs.* Columbia Township Trustees, 179 U. S., 483.

It seems clear that the decree of the Circuit Court of Appeals was final.

Sec. 6, Act March 3, 1901, Vol. 1, Supplement U. S. Revised Statutes, 903.

Ayres *vs.* Polsdorfer, 187 U. S., 585.

Rule eight of the Supreme Court.

In Loeb *vs.* Columbia Township Trustees, supra, this Court said:

> "The rule of our court referred to does not apply alone to cases brought here from the highest Court of a State. It applies, in terms, to all cases brought to this Court by writ of error or appeal. What, therefore, was said in the above cases as to the object and effect of the rule applies to records from a Circuit Court of the United States."

And in the same case the court said:

> "The subject was again considered in Gross *vs.* United States Mortgage Co., 108 U. S., 477, 486, which came from the Supreme Court of Illinois.

> After referring to what was said in Murdock *vs.* City of Memphis, this Court said: 'We can not, therefore, doubt that in the existing state of the law it is our duty to examine the opinion of the Supreme Court of Illinois, in connection with other portions of the record, for the purpose of ascertaining whether this writ of error properly raises any question determined by the State court adversely to a right, title, or immunity under the constitution or laws of the United States and specially set up and claimed by the party bringing the writ.'"

There is nothing in the case involving the construction or the application of any Act of Congress. There is no claim upon the part of the petitioner that the constitution or law of a State is in contravention of the Constitution of the United States.

The only claim is this: It is conceded the Probate Court of the State of Washington had jurisdiction of the subject-matter. It is claimed, however, in the bill of complaint, that the necessary processes were not served to enable the Court to obtain jurisdiction of the parties, and it is alleged that the Court proceeded without jurisdiction, and it is claimed if the Court is permitted to proceed and distribute the estate, petitioners will be deprived of their property without due process of law, and that the proceeding would, therefore, be in violation of the 14th amendment to the Constitution of the United States. This averrment, however, in the bill of complaint, to the effect that the Probate Court proceeded without jurisdiction of persons, is specifically denied in the answer.

The answer of Marie Carrau says:

> "The defendant, Marie Carrau, denies that the Supreme Court of King County, Washington, acted wholly or at all without jurisdiction, in probating said non-cupative will, but on the contrary said Court had and has exclusive jurisdiction in the premises." (Record, vol. 1, pages 64–79.)

But aside from this, however, if, as alleged, the Court was wholly without jurisdiction, then the judgment and decree of the Court is absolutely void. No decree of distribution issued in pursuance of such a decree can have any effect whatever, but is open to attack whenever and wherever its validity is relied upon.

The rights of the petitioners could not be affected by any action taken under a decree that is void for want of jurisdiction. It can not be said that their property, taken under and in pursuance of such a decree, has been taken without due process of law; in fact, it has not been taken at all, and property distributed under such a decree can be recovered back by the petitioners by a proceeding in the State court, by showing that the decree as to the contest between claimants was without jurisdiction and void. Property taken under a void decree is not taken at all, much less taken without due process of law.

The record shows, moreover, the Court had jurisdiction of the persons and of the subject-matter. It was not a proceeding *inter-partes*, but a special proceeding in the nature of a proceeding *in rem*, and the record shows that the statutes of the State were fully complied with.

It is respectfully submitted, therefore, this appeal should be dismissed for two reasons:

First—Because the decision of the Court of Appeals is final under Section 6 of the Judiciary Act of March 3, 1891, and,

Second--Because it is clear from the record that neither the Circuit Court, the Circuit Court of Appeals, nor this Court has any jurisdiction of the case.

In support of the latter contention, see our brief filed in this case in opposition to the petition for writ of certiorari.

Respectfully submitted.

W. F. HAYS,
JOHN H. MITCHELL,
Attorneys for Respondent, Marie Carrau.